In the Supreme Court

Appeal from the Court of Appeals
Honorable Michael J. Talbot

REBECCA GROSSMAN, as Personal Representative of the Estate of FRED GROSSMAN, deceased,

Plaintiff-Appellee,

v

Docket No. 122458

OTTO W. BROWN, M.D., SINAI HOSPITAL, an assumed name of SINAI HOSPITAL OF GREATER DETROIT, a Michigan non-profit corporation,

Defendants-Appellants,

and

ROBERT MURRAY, M.D.,

Defendant.

REPLY BRIEF - APPELLANTS

*****ORAL ARGUMENT REQUESTED*****

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

STATUTES AND OTHER AUTHORITIES

ARGUMENTS

I. PLAINTIFF'S ATTEMPT TO ENLARGE THE RECORD ON APPEAL IS IMPROPER AND SHOULD BE REJECTED.

The only evidence presented by plaintiff to the trial court, as attached to plaintiff's lower court pleadings, were the following:

1. Curriculum Vitae of Dr. Zakharia (Appendix p 84a)
2. Affidavit of Ari Berris (believed to be an employee of plaintiff's counsel) (Appendix p 93a)
3. A listing of ABMS Approved Specialties (Appendix p 95a)
4. Website printouts from the American Board of Surgery (Appendix p 98a)

Nonetheless, with her appeal brief, plaintiff files with this Court, among others, deposition excerpts, affidavits and excerpts from various web sites, which were not presented to the trial court below.[1] Plaintiff also cites to, but does not attach, depositions of Dr. Zakharia in other cases, also not presented below (Plaintiff's brief, p 25). It is well-established that a party cannot enlarge the record on appeal. See Amerollo v Monsanto Corp, 186 Mich App 324; 463 NW2d 487 (1990) (plaintiff's references to documents not presented to the trial court cannot be considered by the Court); Trail Clinic, P.C. v Bloch, 114 Mich App 700; 319 NW2d 638 (1982) (evidence that the plaintiff sued the wrong party, which is not part of the record, cannot be presented on appeal).

Among others, plaintiff refers to the deposition of Wayne S. Gradman, M.D. taken on June 3, 2002 (Appendix p 1b). (While the copy included in plaintiff's appendix does not indicate the date of this deposition, the copy used by plaintiff in response to the

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[1] Defendants have voiced objections to the submission of these materials as improper on several occasions in the appellate process, most recently in footnote 7 on page 25 of defendants' appeal brief. However, plaintiff continues to attempt to enlarge the record on appeal and provides no explanation to this Court or any legal basis why such matters should be considered by this Court.

application for leave to appeal clearly contains a date at the top which dates the deposition as taken on June 3, 2002.) Such deposition, however, was taken after the hearing on the motion for partial summary disposition and/or to strike and was not presented to the trial court.[2] Plaintiff also relies on the deposition of Alex Zakharia, M.D. taken on April 22, 2002, again after the trial court ruled on the motion to strike the affidavit and for partial summary disposition (Appendix p 12b). Dr. Zakharia's deposition was thus also not presented to the trial court for review.

Also submitted by plaintiff are affidavits of Dr. Gradman and Dr. Zakharia. However, Dr. Gradman's affidavit is dated as signed in California on November 28, 2001, after the initial trial court hearing in October and only 5 days before the second hearing on December 4, 2001. There is no evidence in the record that Dr. Gradman's affidavit was in fact filed with the trial court. Dr. Zakharia's affidavit, which plaintiff submits with her appeal brief, is unsigned.

Plaintiff also includes in his appendix, without providing any legal authority for their introduction now, the following: ABMS Policy Statement (Appendix p 35b), ABS Vascular Surgery Statement (Appendix p 47b), AMA Information Sheet, Otto Brown, M.D. (Appendix p 50b) and AMA Information Sheet, Alex T. Zakharia, M.D. (Appendix p 52b).

Defendants submit that plaintiff's appendix in its entirety should be stricken and plaintiff's brief on appeal should be stricken.

II. BOARD CERTIFICATION DOES EXIST FOR VASCULAR SURGERY.

As set forth in defendants' appeal brief, the provisions of MCL 600.2169 simply require that if the healthcare provider is specialist, the expert must so specialize and if the healthcare provider is board certified in that specialty, the expert must also be board

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[2] The hearings on defendants' motion were conducted on October 19, 2001 and December 4, 2001. The motion was verbally denied at the December 4, 2001 hearing (Appendix 188a), and the formal order was entered on June 6, 2002 (Appendix 190a).

certified in that specialty. Here, Dr. Brown specializes in vascular surgery and is board certified in that specialty by the American Board of Surgery. The plaintiff's expert neither specializes in vascular surgery nor is he board certified by the American Board of Surgery in Vascular Surgery. Thus, the expert was not qualified to sign the affidavit of merit (or testify at trial).

Contrary to plaintiff's assertions, section 2169 does not require that there be a separate ABMS Board of Vascular Surgery. The statute only states "board certified." It makes no reference to the American Board of Medical Specialists (ABMS).[3] The statute does not say that board certification must be conferred by a board of the specialty at issue (i.e. vascular surgery). The statute simply says "board certified." Here, the certification in Vascular Surgery was issued by a nationally recognized board, the American Board of Surgery. Regardless, there is a Board of Vascular Surgery (which plaintiff conveniently fails to mention) discussed in detail in defendants' appeal brief. The Board of Vascular Surgery was created by the Board of Surgery to administer the testing and granting of certification in Vascular Surgery (Appendix p 140a).

Even the definition of specialist relied upon by plaintiff includes within its definition a subspecialty. On page 17 of plaintiff's brief, plaintiff cites the definition of specialty from the *American Heritage Dictionary of the English Language*, 4th Ed, 2000 which includes the specialty of "cardiology." Cardiology, under the ABMS lists of specialties, comes under the specialty of internal medicine (Appendix p 195a; Cardiovascular disease).

Plaintiff also attempts to diminish and downgrade the requirements necessary to become board certified in Vascular Surgery. As set forth in defendants' brief, and as supported by properly submitted evidence, the requirements are extensive. Contrary to plaintiff's unsupported assertion, it is more than "attending a fellowship" and "submitting

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[3] There are other nationally recognized specialty boards other than the ABMS.

a list of completed surgeries." A qualifying examination and a certifying examination must be successfully completed (Appendix pp 140a-141a). This task has been delegated to the Vascular Surgery Board. This Board is charged with the task of developing the qualifying exam, which is defined as a written examination of multiple-choice questions (Appendix p 140a). If the candidate successfully completes this exam, he or she will be admitted to take the certifying oral examination (Appendix p 140a). The candidate must also provide evidence establishing a major commitment and dedication to Vascular Surgery by submitting "documentation of the major vascular reconstructive procedures, involving an acceptable spectrum of relevant areas since completion of an accredited program in Vascular Surgery" and an "operative experience list on which is to be tabulated the cases which have been performed *after* completion of the Fellowship" (Appendix pp 140a-141a). Clearly more is required than attending a fellowship and submitting a list of completed surgeries, as plaintiff claims. More is involved than, as plaintiff insultingly claims, paying "$1,350" for "another piece of paper to frame on their office wall."

As discussed above, plaintiff attaches and relies upon numerous materials not provided to the trial court. Such is clearly an improper enlargement of the record on appeal and should be precluded by this Court. Nonetheless, none of the materials submitted establish a basis to conclude other than that Vascular Surgery is a specialty for which board certification is granted by a nationally recognized board. The policy statement of the ABMS attached by the plaintiff does not change this conclusion. Among others, that policy statement states:

> The ABMS shall have the responsibility to establish standards for the approval of new specialties and subspecialties. In fulfilling this responsibility, the ABMS will develop generic criteria for admission to the certification process and develop guidelines for Boards to conform to generally accepted standards.
>
> The purpose of subspecialty certificates is to establish standards of preparation to be required of those individuals who wish to provide care to the public in a subspecialty area that the ABMS has determined is of sufficient importance to be so designated.

> It is the policy of the ABMS that recognition of subspecialty certifications should be primarily for individuals who are devoting a major portion of their time and efforts to that restricted special field. Subspecialty certification should be granted only after education and training or experience in addition to that required for general certification in the discipline. [Appendix p 43b.]

Even the Vascular Surgery Statement filed by plaintiff recognized "certification" in vascular surgery:

> A certification in Vascular Surgery is already in place, and has been since 1983. [Appendix p 47b.]

In addition, that statement recognizes the existence of the Vascular Surgery Board:

> The interests and concerns of the discipline of Vascular Surgery are currently very well addressed through the Vascular Surgery Board of the American Board of Surgery (VSB-ABS), and have been since 1998 when the ABS completely reorganized itself into a commonwealth system of governance designed to allow specialties within its traditional purview to manage their own affairs and to direct their own futures but as part of a common Board construct. [Plaintiff's Appendix pp 47b-48b.]

III. PLAINTIFF HAS FAILED TO COME FORWARD WITH ANY EVIDENCE TO ESTABLISH WHAT PLAINTIFF'S COUNSEL BELIEVED AT THE TIME THE AFFIDAVIT WAS FILED REGARDING HIS PROPOSED EXPERT'S QUALIFICATIONS.

Plaintiff's counsel has failed to present any evidence as to what he believed the qualifications of his expert and Dr. Brown were at the time the affidavit of merit was filed. Thus, plaintiff did not and cannot establish that at the time counsel filed the affidavit of merit signed by Dr. Zakharia, counsel reasonably believed Dr. Zakharia met the requirements for an expert witness under MCL 600.2169. Without such evidence, plaintiff failed to satisfy his burden of proof in responding to the summary disposition motion and thus the motion should have been granted.

As noted above, the deposition testimony and affidavits submitted by plaintiff are an improper attempt to enlarge the record on appeal. Regardless they do not establish what counsel believed at the time the affidavit was filed. Among others, plaintiff improperly submits to this Court documentation allegedly from the website of the American Medical Association claiming that such establishes that Dr. Brown is not listed

as a vascular surgeon. If this Court considers such evidence, defendant requests that it be allowed to present evidence that Dr. Brown has not paid dues to the American Medical Association since 1997. Further, the document provided by plaintiff states that Dr. Brown is not a member and incorrectly identifies him as a thoracic surgeon.

Even more so, there is no reason to explain why plaintiff would list Dr. Brown as a vascular surgeon in his complaint if he did not know the specialty of Dr. Brown (Appendix 4a, ¶ 2 and 8a, ¶ 36). The complaint alleges that Dr. Brown engages and holds himself out to the public as a specialist in the field of vascular surgery (Id.). Even the affidavit of merit signed by Dr. Zakharia and filed by plaintiff, which plaintiff claims satisfies MCL 600.2912b, identifies Dr. Brown as a vascular surgeon:

> As a specialist in the field of vascular surgery, DR. OTTO W. BROWN, M.D. owed his patients a duty to practice his specialty in accordance with the standard of care. [Appendix 19a.]

Thus, when the affidavit of merit was filed, plaintiff was aware of Dr. Brown's specialty in vascular surgery. It is disingenuous for plaintiff to now claim, for the first time on appeal, that the AMA does not list Dr. Brown as a vascular surgeon. Plaintiff clearly knew when the affidavit of merit and complaint were filed that the care at issue concerned treatment by a specialist in vascular surgery as such was acknowledged by plaintiff's own expert and alleged within the complaint. Further, a search of the website for the ABMS under Dr. Brown's name would reveal that Dr. Brown is listed as a general surgeon and a vascular surgeon. Further, a search of the website for the ABMS under Dr. Brown's name would reveal that Dr. Brown is listed as a general surgeon and a vascular surgeon. Regardless, plaintiff has presented no evidence of when counsel allegedly looked at this American Medical Association site. Such proposed evidence if filed with the trial court would have only been relevant if plaintiff examined it at the time the affidavit of merit was filed.

In Maiden v Rozwood, 461 Mich 109; 597 NW2d 817 (1999), reh den 461 Mich 1205 (1999), this Court clarified the standards of proof to which the non-moving party is held in deciding a motion for summary disposition. In that case, the Court indicated "a litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." The Court later stated that "the reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." Maiden, supra, 119.[4]

More than conclusory statements are required to defeat a motion for summary disposition. In Quinto v Cross and Peters Co, 451 Mich 358, 370-371; 547 NW2d 314 (1996), this Court held that summary disposition in that employment discrimination case was proper because the plaintiff's affidavit contained only conclusory statements that she was subjected to harassment and "disclosed no specific instances of ethnic, sexist, or ageist remarks . . . from which an inference of a hostile work environment could be drawn. The affidavit did not describe with particularity when, where or how plaintiff was harassed." Noting the general rule that the defendant must support the motion with documentary evidence, the Court stated:

> [P]laintiff, as the opposing party, had the duty to rebut with documentary evidence defendant's contention that no genuine issue of material fact existed. Plaintiff's affidavit did not satisfy her burden as the opposing party; rather it constituted mere conclusory allegations and was devoid of detail

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[4] While the initial motion identifies in the opening paragraph MCR 2.116(C)(8) as the grounds for the motion, it is clear from reviewing pg 5-6 of the brief that relief is also sought under MCR 2.116(C)(10) as lack of a genuine issue of fact is also discussed (Appendix p27a-28a). Further, substantial evidence other than the pleadings was presented with both the motion and the supplemental brief (Appendix 23a and 101a). See Collins v Detroit Free Press Inc, 245 Mich App 27; 627 NW2d 5 (2001), lv den 465 Mich 892 (2001) (where documentary evidence is presented both for and against, the Court may treat as a (C)(10) motion).

that would permit the conclusion that there was such conduct or communication of a type or severity that a reasonable person could find that a hostile work environment existed. [Id. at 371-372.]

IV. THE EVIDENCE PRESENTED BY PLAINTIFF ESTABLISHES THAT THIS EXPERT CANNOT SATISFY SECTION 2169 AS THE EXPERT DID NOT DEVOTE A MAJORITY OF HIS TIME TO EITHER VASCULAR SURGERY OR GENERAL SURGERY.

Even if the Court considers the evidence noted above, summary disposition should have been granted in favor of Dr. Brown and Sinai Hospital. Among the requirements in MCL 600.2169 is a requirement that the expert devote a majority of his professional time in the same specialty as the health care practitioner against whom he is rendering testimony. MCL 600.2169 states:

> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

The deposition testimony of Dr. Zakharia attempted to be introduced now by plaintiff is supportive of defendants' argument that his expert is not qualified to render testimony against Dr. Brown. This deposition testimony establishes that Dr. Zakharia did not devote a majority of his professional time to vascular surgery or even general surgery at the time of the alleged negligence. Dr. Zakharia testified at his deposition that he has not practiced general surgery since 1997:

> Q. From 1997 through today. Does your practice consist of general surgery?

A. I don't do general surgery as far as practice. The only time I very, very indirectly do is when I use the stomach as a bypass for esophagus or colon interposition, which is rare, or when you do an abdominal aneurysm, but I don't – I will not do anything other than the aorta, so the answer would be, no, I don't do general surgery as a general surgeon. [Plaintiff's appendix 15b.]

Dr. Zakharia further testified that he splits his professional time among three specialties: cardiac work and lung work (thoracic surgery) and peripheral vascular work:

Q. How much of your practice is thoracic surgery?

A. Okay. I do – my practice is divided nearly three ways which would be cardiac work, lung work and peripheral vascular work. And it's about one-third each way and it varies with referral patterns.

Q. So of the three areas, cardiac, lung and peripheral vascular, they are about even, about a third of your practice each?

A. Yes, sir. Very roughly, so, yes.

Q. Non-cardiovascular, that would be the peripheral practice?

A. Yeah, that would be the third part.

Q. Now, if we go five years even prior to that, say, from '92 to '97, was that still the same?

A. About the same. There was a time when I was doing much more cardiac work, open heart and so on.

Q. And if you were doing more cardiac work, would you be doing less peripheral nerve?

A. Probably. [Appendix p15b; emphasis added.]

Thus, this deposition testimony, submitted by plaintiff, in fact establishes that Dr. Zakharia did not and could not meet the requirements of MCL 600.2169(b) as he did not devote more than 50% of his time to the practice of either surgery or vascular surgery.

At the time the motion to strike and for partial summary disposition was filed Dr. Zakharia had not yet been deposed and thus this evidence was not available to defendants. Defendants filed their motion shortly after the answer because of then

existing law requiring a timely objection to an expert's qualifications. See Greathouse v Rhodes, 242 Mich App 221; 618 NW2d 106 (2000), rev'd 465 Mich 885; 636 NW3d 138 (2001). Because Dr. Zakharia's deposition came after the trial court's ruling on the motion, defendants were precluded and did not present this additional argument below.[5]

RELIEF REQUESTED

WHEREFORE, Defendants Sinai Hospital and Otto W. Brown, M.D. respectfully request that this Honorable Court reverse the trial court's order denying these defendants' motion to strike and for partial summary disposition and hold that Otto W. Brown, M.D. should be dismissed with prejudice and that the allegations against Sinai Hospital based on care and treatment provided by Dr. Brown should be dismissed. Defendants further request costs and attorney fees.

Respectfully submitted,

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Dated: July 15, 2003

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[5] Defendants, in fact, filed a motion for summary disposition on this basis on January 7, 2003.